No. 17-204

In the Supreme Court of the United States

APPLE INC., PETITIONER

v.

ROBERT PEPPER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
MAKAN DELRAHIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ANDREW C. FINCH
Principal Deputy Assistant Attorney General
ZACHARY D. TRIPP
Assistant to the Solicitor General
KRISTEN C. LIMARZI
ADAM D. CHANDLER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether respondents can seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. 15, based on their claim that Apple has monopolized the distribution of iPhone apps, where respondents were injured by Apple's conduct only to the extent that third-party app developers passed on Apple's allegedly supracompetitive commission in setting the prices that respondents paid.

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INTEREST OF THE UNITED STATES

The Court granted certiorari to consider whether respondent consumers can seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. 15, based on their claim that Apple has monopolized the market for the distribution of iPhone apps. The Department of Justice has responsibility for enforcing federal competition laws and a strong interest in their correct application. The United States also has an interest in promoting sound private antitrust enforcement, which is an important supplement to the government's own antitrust enforcement efforts. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

Section 4 of the Clayton Act authorizes an award of treble damages to "any person who shall be injured in

his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. 15(a). In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), this Court held that Section 4's treble-damages remedy is not available to a plaintiff who relies on a "pass-on theory" of injury—that is, an allegation that the antitrust violator unlawfully overcharged a third party, and that the third party then passed on the overcharge to the plaintiff. *Id.* at 736. This case concerns the application of that rule to a Section 4 suit brought by purchasers of iPhone apps who allege that Apple has unlawfully monopolized the market for iPhone app distribution.

1. Apple introduced the iPhone in 2007. Pet. App. 2a. Shortly thereafter, it launched the App Store, an electronic marketplace that allows users to download iPhone apps. *Ibid.* "[T]he phrase 'there's an app for that' is now part of the popular lexicon," as a vast array of kinds of apps are available. *Riley* v. *California*, 134 S. Ct. 2473, 2490 (2014). Millions of apps are currently available in the App Store. Pet. Br. 9; see Pet. App. 43a.

Apple itself created some of the apps available in the App Store, but most are developed by third parties. Pet. App. 2a. Each third-party developer chooses the price that will be charged for its app in the App Store, and most make those apps available for free. *Id.* at 2a, 26a. If a developer decides to charge a price, however, Apple takes a 30% commission on each sale. *Id.* at 2a-3a. Apple requires the developer of each app for which a price is charged to select a price "ending in 99 cents," *i.e.*, a price such as $1.99 or $2.99. Pet. Br. 9.

A user who purchases an app (or a license for an app) pays the full price to Apple. Pet. App. 2a-3a, 26a-27a.

Apple retains 30% of that amount and remits the balance to the developer. *Id.* at 3a, 26a.[1] Apple "informs [app] developers (but not its iPhone customers)" of the commission. *Id.* at 52a. Apple does not take ownership of apps created by third-party developers, but instead acts as the developers' agent and completes the sales on their behalf. *Id.* at 20a.

Apple intends the iPhone to be a "closed" system. Pet. App. 2a. Apple prohibits developers from selling iPhone apps directly to consumers, and from distributing apps through any channel other than the App Store. *Id.* at 3a. Apple also discourages iPhone users from installing apps obtained from other sources. *Ibid.*

2. Respondents are iPhone users who purchased apps through the App Store. Pet. App. 46a. In 2011, they filed this putative class action against Apple. *Id.* at 3a. Their operative complaint alleged that Apple had violated Section 2 of the Sherman Act, 15 U.S.C. 2, by monopolizing the market for the distribution of iPhone apps. Pet. App. 3a, 24a. Respondents further alleged that Apple's 30% commission is supracompetitive, and that they "have been injured by Apple's anticompetitive conduct because they paid more for their iPhone apps than they would have paid" in a market in which developers could distribute apps through other channels. *Id.* at 53a. Along with other relief, respondents seek to recover three times the amount of the alleged overcharges under Section 4 of the Clayton Act. *Id.* at 63a.

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[1] Because this case arises on a motion to dismiss, we describe the facts as alleged in respondents' complaint. Pet. App. 2a. To the extent the parties dispute what the complaint is fairly read to allege, we rely on the reading adopted by the district court and left undisturbed by the court of appeals. See Cert. Reply Br. 2-3.

The district court dismissed respondents' complaint, holding that their Section 4 claim is barred by *Illinois Brick*. Pet. App. 23a-37a. The court explained that, although respondents' allegations are somewhat unclear, their complaint "is fairly read to complain about a fee created by agreement" between Apple and third-party app developers, under which the developers agree "to pay Apple 30% from their own proceeds." *Id.* at 36a. Accordingly, the court observed, Apple's 30% commission is "borne *by the developers*" in the first instance and is then "passed-on to [users] as part of the purchase price" the developers set. *Ibid.* The court therefore held that respondents' damages claim rests on allegations of passed-on harm, which this Court disapproved in *Illinois Brick*. *Id.* at 36a-37a.

3. The court of appeals reversed. Pet. App. 1a-22a. As relevant here, the court held that respondents' claim is not barred by *Illinois Brick* because Apple functions as a distributor of iPhone apps. *Id.* at 13a-21a.

The court of appeals began by reviewing this Court's decisions in *Illinois Brick*; in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968); and in *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199 (1990). Pet. App. 13a-17a. The court of appeals explained that, in both *Illinois Brick* and *Hanover Shoe*, "a monopolizing or price-fixing manufacturer sold or leased a product to an intermediate manufacturer at a supracompetitive price," and the intermediate manufacturer "used that product to create another product, which was ultimately sold to the consumer." *Id.* at 16a. The court similarly characterized *UtiliCorp* as a case in which "a monopolizing producer sold a product to a distributor at an allegedly supracompetitive price," and "[t]he distributor then sold the product to the consumer." *Ibid.* The

court read those decisions to establish a rule that consumers may not sue a "manufacturer or producer" with which they have no direct dealings, but may sue an "intermediary" with which they deal directly, whether that intermediary is an "intermediate manufacturer or [a] distributor." *Id.* at 17a.

Based on that understanding, the court of appeals framed the dispositive question in this case as "whether Apple is a manufacturer or producer, or whether it is a distributor." Pet. App. 17a. The court concluded that *Illinois Brick* does not bar respondents' suit because "Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store." *Id.* at 21a.

The court of appeals identified several specific factors that did *not* affect its analysis. First, the court did not decide whether app developers could bring their own Section 4 suit seeking treble damages from Apple, based on the same allegedly supracompetitive commission that is at issue here. Pet. App. 20a. Second, the court did not rely on the fact that iPhone users pay Apple, "which then forwards the payment to the app developers." *Ibid.* The court explained that it would have reached the same result if users had paid the entire purchase price directly to developers, and developers had then separately paid Apple its commission. *Ibid.* Third, the court deemed it irrelevant that Apple receives a fixed commission, rather than "tak[ing] ownership of the apps and then sell[ing] them to buyers after adding a markup," as a traditional retailer would. *Ibid.* Fourth, the court considered it immaterial that the price for an app is determined "by the app developer" rather than by Apple. *Id.* at 21a.

The court of appeals thus "rest[ed] [its] analysis" solely on what the court perceived to be "the fundamental distinction between a manufacturer or producer, on the one hand, and a distributor, on the other." Pet. App. 21a. The court framed its holding in those terms, concluding that "[b]ecause Apple is a distributor, [respondents] have standing under *Illinois Brick*." *Ibid.* The court acknowledged that the Eighth Circuit had reached the opposite result in a case "closely resembling" this one. *Id.* at 18a (discussing *Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166 (1998), cert. denied, 525 U.S. 1102 (1999)). The court "disagree[d] with the [Eighth Circuit] majority's analysis," however, and instead endorsed the *Campos* dissent. *Id.* at 19a.

SUMMARY OF ARGUMENT

Respondents purchased iPhone apps from the App Store and now seek treble damages from Apple under Section 4 of the Clayton Act, 15 U.S.C. 15. They contend that (1) Apple unlawfully monopolized distribution of iPhone apps; (2) Apple charges an unlawfully high commission on sales from the App Store; and (3) as a result, respondents overpaid for apps. The district court correctly dismissed respondents' complaint, and the court of appeals' contrary ruling should be reversed.

A. Relying in part on background principles of proximate causation, this Court has construed Section 4 not to allow either defendants or plaintiffs to invoke pass-on theories of damages liability. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Court held that an antitrust defendant cannot reduce or eliminate its liability under Section 4 by showing that the plaintiff passed on some or all of an unlawful overcharge to its own customers. In *Illinois Brick Co.* v.

Illinois, 431 U.S. 720 (1977), the Court held that offensive use of pass-on analysis is likewise precluded as a basis for imposing Section 4 liability. The Court in *Illinois Brick* rejected, as non-cognizable under Section 4, the claims of plaintiffs who alleged that an antitrust violator had overcharged third parties, and that those intermediaries had passed on the overcharges to the plaintiffs. And in *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199, 208 (1990), the Court declined to recognize an exception to the *Illinois Brick* rule in a case where the parties that were overcharged in the first instance were "regulated public utilities that pass[ed] on 100 percent of their costs to their customers."

B. Respondents' complaint does not state a valid treble-damages claim under Section 4 because it is premised on the same sort of pass-on allegations that this Court found insufficient in *Illinois Brick*. A consumer who chooses to buy an app from the App Store pays the purchase price and receives the app, but has no economic stake in the manner in which that money is divided between Apple and the developer. Respondents are injured by Apple's allegedly exorbitant commission only if, and to the extent that, developers seek to recover some or all of that commission by increasing the prices of their apps.

Respondents' suit thus depends on the premise that app developers have shifted to consumers some or all of the costs of Apple's commission, rather than pricing their apps at the same level they would choose if no commission (or a smaller, lawful commission) were charged. Respondents' claim of pass-through harm is not cognizable under this Court's precedents. An app *developer*, by contrast, could invoke Section 4 to seek three times the amount of Apple's alleged unlawful overcharge,

since the harm the developer suffers (receiving a lower percentage of the price at which its apps are sold) is not derivative of any injury suffered by a third party.

In holding that respondents' suit is cognizable under Section 4, the court of appeals emphasized that Apple functions as a "distributor" of apps in the App Store, rather than as a "manufacturer or producer." Pet. App. 21a. That analysis is unsound. Although the defendants in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp* were indeed manufacturers or producers, the Court did not identify their functional roles as the ground for its decisions. Rather, it disapproved both defensive and offensive uses of pass-on analysis as bases for determining Section 4 liability.

Because respondents' Section 4 claim is likewise premised on allegations of pass-on injury, it is likewise precluded, despite Apple's role as a distributor. Apple does not set the prices that will be charged to consumers, but instead acts as an agent for app developers, completing sales on the developers' behalf at prices the developers set. That difference is crucial because respondents are injured by Apple's allegedly unlawful commission only if, and to the extent that, developers have responded to Apple's overcharge by increasing the prices charged for their apps.

C. The Court in *Illinois Brick* distinguished between "direct purchaser[s]," who can invoke Section 4, and "indirect purchaser[s]," who cannot. *E.g.*, 431 U.S. at 726. Respondents contend that they qualify as "direct purchasers" under that framework because they purchased apps directly from Apple via the App Store. But the Court has not used the terms "direct purchaser" and "indirect purchaser" to establish an independent legal test. Rather, the Court has used the term

"direct purchaser" as shorthand for a party that bears an antitrust violator's unlawful overcharge in the first instance, and the term "indirect purchaser" as shorthand for a party that bears such an overcharge only to the extent it is passed on by others. See *id.* at 724-726.

A plaintiff whose alleged injury is derivative of harm done to another is not a "direct purchaser" under that analytic framework, even if the plaintiff had a direct contractual relationship with the alleged antitrust violator. Respondents' claim to direct-purchaser status is particularly weak because, although they purchased *apps* directly from Apple, they did not purchase the *app-distribution services* that Apple allegedly monopolized. Any injury they may have suffered is instead derivative of the harm done to the developers who did purchase (and allegedly were overcharged for) those services.

Respondents' suit illustrates the practical concerns that this Court has identified as potential adverse consequences of allowing pass-on damages claims. Because app developers could recover three times the amount of any unlawful overcharge under *Hanover Shoe*, even if some or all of that overcharge had been passed on to consumers, allowing consumers to sue as well would create an evident prospect of duplicative recovery. And conducting pass-on analysis would be particularly difficult in this case, since the prices that respondents paid were set by tens of thousands of different app developers, operating in diverse competitive environments.

ARGUMENT

This court of appeals erred in holding, based on Apple's status as a "distributor" of iPhone apps, that respondents may seek treble damages under Section 4 of the Clayton Act. Under this Court's decisions, Section 4 relief is not available to a plaintiff who relies on a "pass-

on theory" of injury, *i.e.*, an allegation that a third party responded to an alleged overcharge imposed upon it by increasing the price it charged to the plaintiff. See, *e.g.*, *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977). Because respondents' claim of injury is predicated on such an allegation, their damages claim is not cognizable under Section 4.

SECTION 4 OF THE CLAYTON ACT DOES NOT AUTHORIZE DAMAGES CLAIMS THAT ARE PREMISED ON A THEORY OF PASSED-ON HARM

A. Under *Illinois Brick*, A Plaintiff Cannot State A Claim For Treble Damages Under Section 4 By Alleging That The Defendant Unlawfully Overcharged A Third Party Who In Turn Passed On The Overcharge To The Plaintiff

Section 4 of the Clayton Act states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained." 15 U.S.C. 15(a). "A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 529 (1983). But this Court has found it "plain" that, when Congress enacted the Clayton Act, "Congress intended the Act to be construed in the light of its common-law background." *Id.* at 531, 535; see *id.* at 529-535.

Of particular relevance here, this Court has long construed Section 4 to incorporate background principles of proximate cause, including the principle that "'[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" *Associated*

Gen. Contractors, 459 U.S. at 532, 534 (quoting *Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (Holmes, J.)); *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 490 n.8 (1968) (same); cf. *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 271 (1992) (same for the treble-damages provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964(c), which is modeled on Section 4 of the Clayton Act). In three decisions articulating what has come to be known as the *Illinois Brick* rule, this Court has construed Section 4 not to allow either plaintiffs or defendants to invoke pass-on theories of damages liability.

1. In *Hanover Shoe*, the Court rejected an asserted pass-on defense to a Section 4 action. In that case, a shoe manufacturer (Hanover) sued a manufacturer of shoe-making machines (United), alleging that United had monopolized the market and had overcharged Hanover for the use of its machines. 392 U.S. at 483-484. The district court agreed and awarded Hanover three times the amount of the overcharge. *Id.* at 487. In this Court, United argued that Hanover had not been "injured in [its] business or property," 15 U.S.C. 15(a), because it had passed on the overcharge to its customers by increasing "the price charged for shoes." *Hanover Shoe*, 392 U.S. at 487-488. The Court rejected that defense as a matter of law, holding that a plaintiff that has been unlawfully overcharged by an antitrust violator "is equally entitled to damages" even if it has passed on the overcharge to its own customers. *Id.* at 489. The Court identified two practical justifications for that holding.

First, the Court believed that establishing the extent to which a plaintiff had passed on the defendant's over-

charge would normally entail "insurmountable" problems of proof and would often impede the resolution of treble-damages actions with "massive evidence and complicated theories." *Hanover Shoe*, 392 U.S. at 493. The Court stated that "[a] wide range of factors influence a company's pricing policies," and that it would be difficult or impossible to determine whether a plaintiff had raised its prices because of the defendant's overcharge or for other reasons. *Id.* at 492. The Court also expressed the view that it would be "[e]qually difficult to determine" the extent to which such a price increase had been offset by a reduction in the plaintiff's sales. *Id.* at 493.

Second, the Court believed that permitting pass-on defenses would "substantially reduce[]" the deterrent effect of treble-damages suits. *Hanover Shoe*, 392 U.S. at 494. The Court recognized that, as a practical matter, the economic burden of an antitrust violation will often be borne by the "ultimate consumers" in the distribution chain—in *Hanover Shoe*, consumers who had bought "single pairs of shoes." *Ibid.* While acknowledging that those consumers in the aggregate might ultimately bear the brunt of the overcharge, the Court was concerned that each consumer would have "only a tiny stake in a lawsuit and little interest in attempting a class action." *Ibid.*

The *Hanover Shoe* Court viewed the Section 4 rule that it articulated—prohibiting inquiry into whether the plaintiff had passed on all or part of an overcharge to its own downstream customers—as consistent with the Court's earlier decisions. The Court stated that, "[f]undamentally, this is the view stated by Mr. Justice Holmes in" *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906). *Hanover Shoe*, 392 U.S.

at 489. In that case, Atlanta had operated a water-supply system that charged customers for water, and it had "sued the defendants for treble damages for anti-trust violations in connection with the city's purchases of pipe for its waterworks system." *Ibid.* Although Atlanta had presumably recouped at least part of the overcharge by increasing its prices, "[t]he Court affirmed a judgment in favor of the city for an amount measured by the difference between the price paid and what the market or fair price would have been had the sellers not combined," *i.e.*, the amount of the overcharge. *Id.* at 489-490. Although the measure of damages was not disputed on appeal, the Court addressed the issue, stating that Atlanta "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id.* at 490 (quoting *Chattanooga Foundry*, 203 U.S. at 396).

The *Hanover Shoe* Court further observed that Justice Holmes had expressed "similar views" in *Southern Pacific*. *Hanover Shoe*, 392 U.S. at 490. *Southern Pacific* was a treble-damages case under the Interstate Commerce Act of 1887, ch. 104, § 8, 24 Stat. 382, brought by shippers who contended that a railroad had overcharged them. The railroad argued that "the shippers should not recover because they were able to pass on to their customers the damage they sustained by paying the charge." *Hanover Shoe*, 392 U.S. at 490 n.8 (describing *Southern Pacific*). The *Southern Pacific* Court rejected that contention. In the course of its analysis, the Court stated:

> The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it

> does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.

Ibid. (quoting *Southern Pacific*, 245 U.S. at 533-534).[2]

2. In *Illinois Brick*, the Court held that antitrust plaintiffs, as well as defendants, are barred from asserting pass-on theories of damages under Section 4. Illinois and a group of local governments sued manufacturers of concrete blocks, alleging that the defendants had fixed the prices charged to contractors, which in turn had passed on the overcharge to government entities in setting prices for construction work. 431 U.S. at 726-727. This Court held that, just as "a pass-on theory may

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[2] In various statutory contexts, this Court has continued to quote the "first step" language derived from *Southern Pacific*, and to reject the damages claims of plaintiffs whose alleged injuries are wholly derivative of harms done to others. *E.g.*, *Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1306 (2017); *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1394 (2014); *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 10 (2010). In *Holmes*, for example, an insurer for broker-dealers sued for treble damages under RICO on the theory that the defendant's stock-manipulation conspiracy had rendered the broker-dealers insolvent and had thereby required the insurer to cover their liabilities. See 503 U.S. at 271. The Court held that the suit could not go forward, explaining that, under the common law, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Id.* at 268-269. The Court applied that rule to bar the insurer's claim for damages, quoting the "first step" language from *Southern Pacific* and explaining that the insurer's economic loss was "purely contingent on the harm suffered by the broker-dealers." *Id.* at 271.

not be used defensively by an antitrust violator" to reduce damages owed to a "direct purchaser plaintiff," such a theory may not be "used offensively by an indirect purchaser plaintiff" who alleges that it was overcharged when the violator's supracompetitive prices were passed on by third parties like the contractors in that case. *Id.* at 726; see *id.* at 736.

The *Illinois Brick* Court described *Hanover Shoe* as holding that "a direct purchaser suing for treble damages under § 4 of the Clayton Act is injured within the meaning of § 4 by the full amount of the overcharge paid by it," and that a defendant "is not permitted to introduce evidence that indirect purchasers were in fact injured by the illegal overcharge" because the direct purchaser passed it on by increasing its own price. *Illinois Brick*, 431 U.S. at 724-725. The Court then held that a plaintiff is similarly barred from predicating a Section 4 claim on an allegation that unlawful overcharges were passed on to it. The Court explained that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants," who could be held liable to both direct and indirect purchasers for the same overcharge. *Id.* at 730. The Court added that the "principal basis" for its decision in *Hanover Shoe* had been the desire to avoid pass-on inquiries that would "greatly complicate and reduce the effectiveness of already protracted treble damages proceedings." *Id.* at 731-732. The Court concluded that this concern "applies with no less force to the assertion of pass-on theories by plaintiffs than it does to the assertion by defendants." *Id.* at 732.

Having held that offensive and defensive uses of pass-on harm should stand or fall together, the Court

stated that the *Illinois Brick* plaintiffs could not "recover on their pass-on theory" unless the Court "overrule[d] *Hanover Shoe*." 431 U.S. at 736. The Court declined to do so. The Court stated that "[p]ermitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," ranging "from direct purchasers to middlemen to ultimate consumers." *Id.* at 737. The Court concluded that, "[h]owever appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits." *Ibid.*

3. In *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199 (1990), public utilities sued natural-gas producers and a natural-gas pipeline company, alleging that those entities "had conspired to inflate the price of their gas in violation of the antitrust laws." *Id.* at 204. Kansas and Missouri sued the same defendants on behalf of residents who had purchased gas from the utilities, alleging that the utilities had passed on the overcharges by increasing their state-regulated gas prices. *Id.* at 204-205. The States argued that the Court should recognize an exception to the *Illinois Brick* rule for cases "involving regulated public utilities that pass on 100 percent of their costs to their customers." *Id.* at 208.

This Court declined to create that exception. It acknowledged that "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases," and that establishing the extent to which a direct purchaser has passed on an overcharge may be easier in some circumstances than in others. *UtiliCorp*, 497 U.S. at 216. The Court declined, however, to "carve out exceptions" for "particular types of

markets." *Ibid.* (quoting *Illinois Brick*, 431 U.S. at 744). The Court explained that "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule," *ibid.*, because the "process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility to proof in a judicial forum would entail the very problems" that the *Illinois Brick* rule was intended to avoid, *ibid.* (quoting *Illinois Brick*, 431 U.S. at 744-745).[3]

4. Although *Illinois Brick* bars both offensive and defensive uses of pass-on in treble-damages suits under Section 4, the rule is limited in two important respects.

First, the *Illinois Brick* rule does not apply to suits seeking injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. 26. This Court's decisions disapproving the use of pass-on approaches to damages liability under Section 4 do not speak to whether particular conduct by defendants violates the antitrust laws; they are instead rooted in concerns specific to monetary relief. See *Hanover Shoe*, 392 U.S. at 490 n.8 (quoting Justice Holmes's description of the rule for recovering damages);

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[3] This Court has left open the possibility that exceptions to the *Illinois Brick* rule might be appropriate in certain narrow circumstances. Those include cases in which "the direct purchaser is owned or controlled by its customer," and cases where a preexisting cost-plus contract ensures that "the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge." *Illinois Brick*, 431 U.S. at 736 & n.16; see *UtiliCorp*, 497 U.S. at 217-218. The United States and the Federal Trade Commission (FTC) have also advocated that the *Illinois Brick* rule should not apply in some situations governed by the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. 6a. See U.S. & FTC Amicus Br. at 6, *Motorola Mobility LLC* v. *AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015) (No. 14-8003). Those potential exceptions are not at issue in this case.

see also *Associated Gen. Contractors*, 459 U.S. at 532 (discussing common-law rules that have traditionally "circumscribed the availability of damages recoveries"). And suits by indirect purchasers seeking only injunctive relief do not raise the same concerns about "duplicative recovery" or "the complexity of apportioning damages." *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 111 n.6 (1986); see, *e.g.*, *Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166, 1172 (8th Cir. 1998), cert. denied, 525 U.S. 1102 (1999); *McCarthy* v. *Recordex Serv., Inc.*, 80 F.3d 842, 856 (3d Cir.), cert. denied, 519 U.S. 825 (1996).[4]

Second, in the decades since *Illinois Brick* was decided, more than two-thirds of the States have authorized the use of pass-on analysis to apportion damages under their own antitrust laws, which otherwise generally parallel federal law. See Antitrust Modernization Comm'n, *Report and Recommendations* 268-269 (Apr. 2007) (*AMC Report*). This Court has held that those state laws are not preempted because the *Illinois Brick* rule "defin[es] what sort of recovery federal antitrust law authorizes" and does not "defin[e] what federal law allows States to do under their own antitrust law." *California* v. *ARC Am. Corp.*, 490 U.S. 93, 103 (1989).

The regime of parallel federal and state antitrust litigation has proved to be complex and inefficient, and

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[4] The district court dismissed respondents' complaint based on its holding that *Illinois Brick* bars their treble-damages claim. Pet. App. 37a. The complaint also includes a request for injunctive relief, *id.* at 63a, which respondents argued on appeal should be allowed to proceed even if their treble-damages claim cannot, Resps. C.A. Br. 53-54. The court of appeals had no occasion to address that argument, which will remain open on remand if this Court holds that *Illinois Brick* forecloses respondents' treble-damages claim.

some commentators have concluded that the evidentiary complexities associated with pass-on analysis are not as great as this Court believed them to be. See *AMC Report* 268-272; 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346k, at 219-227 (4th ed. 2014). The parties have not asked the Court to revisit *Illinois Brick* or *Hanover Shoe*, however, and the only question presented is how to apply those precedents here.

B. *Illinois Brick* Bars Respondents' Treble-Damages Claim Because That Claim Depends On Allegations That Third-Party App Developers Passed On All Or Part Of Apple's Alleged Unlawful Overcharge

1. Respondents allege that Apple monopolized the "distribution market for iPhone apps." Pet. App. 56a. They further allege that they "have been injured by Apple's anticompetitive conduct because they paid more for their iPhone apps than they would have paid" if developers had been allowed to sell their apps through other channels. *Id.* at 53a. According to respondents, the availability of alternative distribution channels would have forced Apple "to substantially lower its 30% [commission]," which would have led to lower app prices. *Id.* at 55a. As the district court explained, respondents' complaint is "fairly read to complain about a fee * * * borne *by the developers* to pay Apple 30% from their own proceeds—an amount which is passed-on to the consumers as part of the purchase price." *Id.* at 36a.

a. Respondents' complaint does not state a valid treble-damages claim under Section 4 because it is premised on the same sort of pass-on allegations that this Court found non-cognizable in *Illinois Brick*. A consumer who pays (for example) $6.99 for an app in the App Store has no economic stake in how that price is

divided between Apple and the developer. If Apple's 30% commission is excessive, the resulting economic loss is borne most immediately by the developer, whose receipts from the sale are reduced by 30% in every case. Consumers are injured by Apple's allegedly exorbitant commission only if, and to the extent that, developers seek to recoup some or all of that commission by setting app prices at higher levels than they otherwise would.

Under Apple's pricing system, an app developer's choice of the price to be charged for a particular app dictates the exact amount of money that the purchaser will pay; the exact amount of money that the developer will receive; and the exact amount of the commission that Apple will retain. For example, when a developer that would otherwise price its app at $6.99 confronts Apple's 30% commission, it can leave the price at $6.99, preserving sales volume but absorbing the entire commission ($2.10) itself and receiving $4.89 on each app sold. It can increase the price to $9.99, passing on the full amount of the commission ($3.00) to the customer and receiving $6.99 per app but likely losing sales. Or it can charge a price between $6.99 and $9.99, thereby passing on to consumers some but not all of the cost of Apple's commission. Respondents' claim of injury depends on the premise that the developers of the apps they purchased chose the second or third option, and that respondents paid more for apps as a result. That is precisely the sort of pass-on claim that this Court has found insufficient to support damages relief under Section 4.

b. An app *developer*, by contrast, could show injury from an unlawfully high commission without relying on any similar pass-on analysis. Most obviously, a developer that prices its app at $6.99 receives $2.10 less per

app sold than it would receive if Apple charged no commission (and, for example, receives $1.40 less per app under the 30% commission than it would receive if Apple instead charged a 10% commission). That injury is the immediate result of the allegedly exorbitant commission, and it is not derivative of any harm done to a third party. The developer loses 30% of the receipts from each sale, regardless of the price that it selects.

To be sure, if Apple eliminated its commission on apps sold in the App Store, many developers might reduce their prices in an attempt to increase sales volume, rather than maintaining their prices at (for example) $6.99 and receiving $2.10 more on each app sold. A particular developer presumably would choose that course if it believed that doing so would increase its total profits. The statement that app developers might decrease their prices if Apple lowered its commission, however, is simply another way of saying that app developers may pass on to consumers some or all of the commission that Apple actually charges. Under *Hanover Shoe*, that possibility would not prevent the developer from recovering three times the full amount of an unlawful overcharge.[5]

2. The court of appeals "rest[ed] [its] analysis" on what it called "the fundamental distinction between a manufacturer or producer, on the one hand, and a distributor, on the other." Pet. App. 21a. The court held that respondents' Section 4 suit may proceed "[b]ecause

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[5] Apple's imposition of an exorbitant commission, moreover, would be expected to cause *some* economic harm to each app developer, regardless of what pricing decision the developer made in response. Even if the developer increased its price by an amount sufficient to pass on to consumers the full amount of the overcharge, it would expect to lose sales volume (and thus a portion of the revenues it would otherwise receive) as a result.

Apple is a distributor" that sold iPhone apps "directly" to respondents. *Ibid.* That holding reflects a misunderstanding of the *Illinois Brick* rule.

The court of appeals observed that *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp* all involved similar supply chains, through which a manufacturer or producer sold or leased a product to an intermediate manufacturer or distributor, which either resold that product or used it to make the product that was sold to consumers (sometimes through other intermediaries). Pet. App. 16a. In *Hanover Shoe*, United leased shoe-making machines to Hanover, which used them to make shoes that were ultimately sold to retail customers. 392 U.S. at 483-484. In *Illinois Brick*, manufacturers of concrete blocks sold them to contractors, who used the blocks in construction for Illinois and its local governments. 431 U.S. at 726. In *UtiliCorp*, the natural-gas producers and pipeline company sold gas to utilities, which resold it to consumers. 497 U.S. at 204.

The court of appeals correctly recognized that, under this Court's decisions, the ultimate consumers in those three distribution chains could not bring Section 4 actions against the original manufacturers or producers, but could have sued the intermediate manufacturers or distributors with which they transacted if those intermediaries had violated the antitrust laws. Pet. App. 16a-17a. In *Illinois Brick*, for example, Illinois could not sue the allegedly price-fixing manufacturers of concrete blocks, but it could have sued the general contractors if those contractors had conspired to fix the prices they charged the State for construction work.

The court of appeals went astray, however, in attempting to derive the governing legal rule from the facts of *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*,

rather than from the rationale for this Court's holdings. As explained above, the Court's rationale rested on its rejection of pass-on claims, whether asserted offensively (by plaintiffs to recover damages for passed-on costs) or defensively (by defendants to avoid damages that the plaintiffs had passed on to their customers). In *Hanover Shoe*, the Court held that a Section 4 defendant is "not entitled to assert a passing-on defense." 392 U.S. at 494. In *Illinois Brick*, the Court again framed the question presented as concerning the "permissibility of pass-on arguments," 431 U.S. at 731, and it extended *Hanover Shoe* to bar "the use of pass-on theories by plaintiffs" as well as by defendants, *id.* at 737; see, *e.g.*, *id.* at 732, 745, 747; cf. *Holmes*, 503 U.S. at 271-272.

In *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*, the consumers would not have needed to use pass-on arguments in suits against the distributors or other intermediaries with which they transacted because those intermediaries set the prices the consumers paid. This case is different. Although Apple acts as an intermediary or distributor, it does not buy apps from app developers and then resell them to consumers at prices of its own choosing. Pet. App. 20a. Instead, it acts as an agent for the developers, completing sales on the developers' behalf at prices the developers set. *Id.* at 20a-21a, 36a.

That difference is critical when applying the *Illinois Brick* rule here. In and of itself, Apple's retention of an unduly large portion of the App Store price would have no economic impact on a consumer who had paid that price. Rather, respondents' claim of injury depends on the assertion that developers responded to Apple's allegedly unlawful commission by setting prices at levels higher than the developers otherwise would have chosen. That is at bottom an allegation of pass-on injury,

even though Apple acts as an intermediary between app developers and consumers and has contractual relationships with both. Accordingly, to prove damages, respondents would need to establish the extent to which Apple's allegedly unlawful practices have caused developers to set higher prices for their apps than they otherwise would have. That is precisely the pass-on inquiry this Court has disapproved. See *Illinois Brick*, 431 U.S. at 737, 743; *Hanover Shoe*, 392 U.S. at 492-493.

C. Respondents Are Not "Direct Purchasers" In The Sense In Which The *Illinois Brick* Court Used That Term

At the certiorari stage, respondents argued that they qualify as "direct purchasers" under *Illinois Brick* because they bought iPhone apps "directly" from Apple. Pet. App. 21a-22a; see Br. in Opp. i, 6, 11. That argument lacks merit. It is true that, unlike the plaintiffs in *Illinois Brick*, respondents purchased apps directly from Apple and thus were in privity of contract with the alleged antitrust violator. As the Court used the terms in *Illinois Brick*, however, the distinction between "indirect" and "direct" purchasers depends on whether a particular buyer's claim of harm from allegedly unlawful practices depends on pass-on arguments. Respondents' claimed injury is derivative of harm done to app developers, since a consumer pays more for an app only if the developer has increased the price it would otherwise set in order to mitigate its own harm from Apple's commission. Respondents therefore are "indirect purchasers" in the sense that is relevant here.

1. Because the terms "direct purchaser" and "indirect purchaser" do not appear in the Clayton Act, the analysis here should focus on the manner in which the Court has used those terms in its Section 4 decisions, not on those terms' common or ordinary meaning. Cf.

Associated Gen. Contractors, 459 U.S. at 536 n.33 (noting that focusing on "directness" or other labels "may lead to contradictory and inconsistent results"). In *Illinois Brick* and *UtiliCorp*, the Court did not use those terms to supply an independent legal test. Rather, the Court used the term "direct purchaser" to describe a party whose economic loss from an unlawful overcharge is not derivative of any other actor's injury, and the term "indirect purchaser" to describe a party that bears such an overcharge only to the extent it is passed on by others. *E.g.*, *UtiliCorp*, 497 U.S. at 206-208; *Illinois Brick*, 431 U.S. at 724-726. The Court has consistently focused on the intervening step of an independent third party's decisionmaking, evidentiary complexities, and on other problems associated with pass-on analysis—not on "directness" in any other sense. Indeed, the Court's opinion in *Hanover Shoe*—the precursor to *Illinois Brick*—did not use the terms "direct purchaser" and "indirect purchaser" at all, much less correlate them to particular roles like "manufacturer" or "distributor."

Even as a matter of common parlance, moreover, respondents would not naturally be characterized as "direct purchasers" in the specific market that Apple allegedly monopolized. Respondents alleged that Apple has monopolized the "distribution market for iPhone applications," by requiring developers to use the App Store in order to make their apps available, then taking a 30% cut of whatever price the developer sets. Pet. App. 36a, 41a. With respect to that allegation, respondents' claim to direct-purchaser status is particularly weak because, although respondents have purchased *apps* directly from Apple, they have not purchased the *app-distribution services* that Apple allegedly monopo-

lized. The benefit that consumers derive from the allegedly monopolized services is contingent on the independent decisions of app developers to utilize those services to distribute apps that consumers find desirable (*i.e.*, to make their apps available in the App Store).

This case is thus analogous to *Hanover Shoe*. Just as shoe-making machines were a "necessary input" for Hanover and other shoe manufacturers, *Campos*, 140 F.3d at 1171, distribution services are a necessary input for app developers' sales of their apps to the public. If, as respondents allege, Apple has monopolized the market for distribution services, the immediate consequence is that developers cannot obtain those services elsewhere and must instead acquire them on Apple's terms—by agreeing to pay Apple's 30% commission. That commission immediately harms developers, who at best can mitigate the harm by raising prices at the cost of losing sales. By contrast, respondent consumers' claims are derivative of the harm to third-party developers, because consumers pay higher prices for apps only to the extent that developers choose to pass on all or part of Apple's commission by setting higher app prices than they otherwise would. See pp. 19-20, *supra*. This Court's decisions prohibit the use of such pass-on claims in treble-damages suits under Section 4.

2. In its decisions establishing and applying the rule against pass-on claims under Section 4, this Court has noted "the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Associated Gen. Contractors*, 459 U.S. at 544; see *Illinois Brick*, 431 U.S. at 730-731. Respondents' suit illustrates those concerns.

a. As discussed above, see pp. 20-21, *supra*, a developer who raised the same allegations that respondents

make here would be a proper plaintiff under Section 4. Allowing consumers *also* to sue, however, would create an evident risk of duplicative recoveries under the Clayton Act. Forcing developers and consumers to fight for "a piece of the same 30% pie" (Br. in Opp. 12) would mitigate that risk. Under *Hanover Shoe*, however, a plaintiff app developer would be entitled to recover three times the amount of any unlawful overcharge, even if it had passed on all or part of that overcharge by raising the price of its app in the App Store. In any event, no app developer is a member of the class here or otherwise a party to this suit, and respondents identify no existing procedural mechanism that would bind all nonparty developers to use the same pass-on analysis as would be used here. Rather, if they were to sue, nonparty developers could "assert conflicting claims to a common fund—the amount of the alleged overcharge—by contending that the entire overcharge was absorbed at that particular level in the chain." *Illinois Brick*, 431 U.S. at 737.

b. Any pass-on analysis here would be substantially more complex than the pass-on analyses the Court disapproved in *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*. Respondents' claim of pass-on harm depends on the contention that app developers would have set lower prices in the App Store if Apple had charged a lower (or no) commission. But there is no basis for assuming that tens of thousands of developers would all have responded in the same way if Apple had lowered its commission to a particular level. Indeed, the likelihood that different third-party app developers reacted to the commission in different ways is heightened by the fact that different apps compete in very different markets. An

"app[] for improving your romantic life," *Riley* v. *California*, 134 S. Ct. 2473, 2490 (2014), for example, may compete with other such apps, and may compete as well with matchmaking services or the like in the broader economy. Such an app would not compete, however, with "apps for planning your budget" or "apps for tracking pregnancy symptoms." *Ibid.* Respondents' claims thus would effectively require a court to engage in myriad pass-on analyses to resolve a single suit.

For the foregoing reasons, respondents are not properly viewed as "direct purchasers" within the meaning of *Illinois Brick*. The Court in *Illinois Brick* used that phrase not to supply a legal test, but instead as a shorthand description of purchasers whose claims of injury are not derivative of harms done to other parties. Respondents' suit for treble damages is predicated on the very pass-on analysis the Court found to be impermissible in *Illinois Brick* and *Hanover Shoe*, as their claim of injury depends on how independent third parties responded to Apple's challenged practices. And although respondents purchased apps directly from Apple, they did not purchase the distribution services that Apple has allegedly monopolized. Allowing respondents' suit to proceed would also give rise to the practical concerns that this Court has associated with both offensive and defensive uses of pass-on analysis. The district court was therefore correct in holding that respondents' claims are not cognizable under Section 4, and the court of appeals' contrary ruling should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
MAKAN DELRAHIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ANDREW C. FINCH
Principal Deputy Assistant Attorney General
ZACHARY D. TRIPP
Assistant to the Solicitor General
KRISTEN C. LIMARZI
ADAM D. CHANDLER
Attorneys

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